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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No. 49

ZENITH RADIO CORPORATION, A CORPORATION,
Petitioner,

vs.

HAZELTINE RESEARCH, INC., A CORPORATION, AND
HAZELTINE CORPORATION, A CORPORATION,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT HAZELTINE CORPORATION

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT HAZELTINE CORPORATION

In this brief, Hazeltine Corporation answers that part of the brief of Petitioner, Zenith Radio Corporation ("Zenith"), which attacks the vacation of the two judgments as to Hazeltine Corporation (Z. Br. 5, 42-49, 58, 115-26).[1]

1. The following abbreviations are used in this brief:
Z. Br.—Zenith's brief
A. —Citation to the printed Appendix
PX —Plaintiff's exhibit
DX —Defendant's exhibit
Throughout this brief, emphasis has been supplied by us unless the contrary is indicated.

CONSTITUTIONAL PROVISION INVOLVED

The Constitutional provision involved is the Fifth Amendment to the Constitution of the United States, which provides in pertinent part:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."

QUESTION PRESENTED

Zenith says that the question presented is whether the Court of Appeals could "dismiss the cause as against Hazeltine Corporation" by holding a pretrial stipulation "null and void" (question 11, Z. Br. 5). But this is not the issue because there was no *cause "against* Hazeltine Corporation" and the court did *not* hold the stipulation "null and void." Instead the issue here is:

> Whether the Court of Appeals erred in vacating the judgments against Hazeltine Corporation since this corporation was not named as a party, was not served with process, did not participate in the trial, was not brought into the lawsuit in any manner, and appeared specially to contest jurisdiction only after trial and entry of findings and after Zenith's submission of a proposed judgment against it, and where jurisdiction was asserted solely on the basis of a stipulation to which this corporation was not a party and which on its face did not even purport to bind this corporation.

STATEMENT OF THE CASE

The Court of Appeals below held void and vacated two judgments totaling over $34,000,000 entered against Hazeltine Corporation in an action in the District Court for the Northern District of Illinois in which Hazeltine Corporation was not a party or served with process (Judgment Order, A. 4236; Opinion, A. 4238-44). The history of the litigation has been set forth in the brief of Hazeltine Re-

search, Inc. ("Hazeltine Research"). This brief will state only such additional facts as are relevant to the question presented as to Hazeltine Corporation.[2]

Hazeltine Corporation, a Delaware corporation with executive offices in Little Neck, Long Island, New York, has no offices, plants or other facilities in the Northern District of Illinois and does not do business in Illinois (A. 4135). Under the venue provisions of the antitrust laws it is not subject to suit in the Northern District of Illinois (15 U.S.C. § 22). It is engaged primarily in the business of research, development and manufacture of advanced electronic equipment for military, air traffic control and navigation, and related purposes for the United States and allied governments. It does not manufacture any consumer products (A. 4135-36).

Hazeltine Corporation's wholly-owned subsidiary, Hazeltine Research, the plaintiff and counterdefendant in the action in which the judgments referred to were entered, is, on the other hand, an Illinois corporation with its principal offices in Chicago (A. 142). Organized and capitalized by Hazeltine Corporation on March 28, 1946, Hazeltine Research has since that time operated as an autonomous corporation with a business wholly separate and apart from Hazeltine Corporation (A. 587-88, 4136). Hazeltine Research is engaged in the business of research, development, ownership, and licensing of United States patents, principally in the fields of radio and television (A. 142). It does not manufacture any equipment of any kind

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2. In the event the Court of Appeals' decision vacating the judgments as to Hazeltine Corporation is reversed, Hazeltine Corporation hereby joins in the brief of Respondent, Hazeltine Research, but without waiver of its contention that the trial court lacked jurisdiction over it.

for consumer or government use, but does render technical assistance and services to its radio and television licensees (A. 105, 4136).

Hazeltine Corporation performs some research for Hazeltine Research, for which it is compensated under contract (A. 4136). Hazeltine Corporation also owns, sells and licenses foreign patents for radio and television, but it does not manufacture any radio or television equipment for domestic or foreign sale (A. 144-45, 4135-36).

Although one might assume from the names that Hazeltine Research is merely the research wing of Hazeltine Corporation, the facts detailed above indicate that is not the case. The research in the product areas within the scope of Hazeltine Corporation's manufacturing activities is conducted by Hazeltine Corporation at its own laboratories in New York and Massachusetts and not by Hazeltine Research (A. 587-88).

A. The Action in Which the Judgments Were Entered and the Parties to It

The judgments held void by the Court of Appeals had been entered on a counterclaim filed in *Hazeltine Research, Inc.* v. *Zenith Radio Corporation,* Civil Action No. 59 C 1847. That action was originally brought in the United States District Court for the Northern District of Illinois on November 19, 1959, by Hazeltine Research, the sole plaintiff, for infringement of one of its United States television patents (A. 11-13). A counterclaim (A. 64-69) against Hazeltine Research was filed by Zenith with leave of court on May 22, 1963, more than three years after the suit was filed (A. 62-63). The counterclaim charged Hazeltine Research with conspiring with Hazeltine Corporation and other persons relative to foreign patents owned by Hazeltine Corporation and by others. Neither before nor

after the filing of the counterclaim did Hazeltine Corporation participate in this litigation in any way. Hazeltine Research and Zenith were the only parties for whom appearances were entered. There was never any attempt to serve Hazeltine Corporation with process, nor any motion to make it a party.

Although the counterclaim alleged that Hazeltine Corporation was the owner of foreign patents involved in the foreign conspiracy there alleged, Hazeltine Corporation's separate identity, apart and distinct from Hazeltine Research, is recognized throughout the counterclaim. The caption and opening statement of the counterclaim is as follows:

Hazeltine Research, Inc., Plaintiff-Counterdefendant vs. Zenith Radio Corporation, Defendant-Counterclaimant	Civil Action No. 59 C 1847

COUNTERCLAIM

"Zenith Radio Corporation, defendant and counterclaimant, counterclaims *against Hazeltine Research, Inc., plaintiff and counterdefendant,* pursuant to Rule 13(a) of the Federal Rules of Civil Procedure and says:"

The caption did not name Hazeltine Corporation either as a counterdefendant or as a third party defendant. Paragraph 3 of the counterclaim alleged:

"3. *Counterdefendant, Hazeltine Research, Inc., the party plaintiff in this suit,* is an Illinois corporation owned and operated as a wholly owned subsidiary of

> Hazeltine Corporation, a New York corporation, engaged in the manufacture and sale of electronic equipment and devices. Counter-defendant's *sole business is research in the radio and TV fields and the licensing of a patent pool in the United States pertaining to radio and television receivers and other electronic products,* said pool being the United States counterpart of a number of inter-related territorial patent pools formed and operated in various market areas of the world, pursuant to a combination and conspiracy *between counterclaimant* [sic "counterdefendant"], *its parent, Hazeltine Corporation,* and sundry other persons and corporations, domestic and foreign, as more particularly described and set forth hereinafter" (A. 65).

Paragraph 4 of the counterclaim similarly distinguished between "counterdefendant and its parent, Hazeltine Corporation," using that phrase twice. It also referred to an alleged agreement "between Hazeltine Research, Inc., Hazeltine Corporation and said co-conspirators . . ." (A. 65-66).

On the basis of the allegations, in which the separateness of the two corporations is clearly recognized, the prayer for relief asked for money damages *only* against *Hazeltine Research, Inc.* The Zenith prayer for relief sought:

> "1. A judgment *against counterdefendant* for treble the amount of damages sustained by defendant *as the* proximate *result* of said acts of *counterdefendant and its co-conspirators* and for costs and attorneys' fees.
>
> "2. An injunction *enjoining counterdefendant* and anyone in privity with it from bringing or prosecuting this or any other action at law or suit in equity charging infringement of any patents against counterclaimant, its agents, vendees, distributors or others in privity with counterclaimant and *enjoining counterdefendant* from continuing its said unlawful combination and conspiracy". (A. 68).

Nowhere in this counterclaim is there the slightest suggestion that recovery is sought against Hazeltine Corporation.

As the counterclaim was not and could not have been directed against Hazeltine Corporation, Hazeltine Corporation did not answer it or in any way defend against it.

B. The Stipulation Upon Which the Trial Court Entered the Judgments Against Hazeltine Corporation

The judgments voided by the Court of Appeals were entered against Hazeltine Corporation by the trial court solely on the basis of a stipulation (A. 55-57) between Zenith and Hazeltine Research dated May 7, 1963 (see p. 12, *infra*). This stipulation was not entered into by Hazeltine Corporation. It was entered into solely by Hazeltine Research and Zenith during the pretrial discovery phase of the litigation before the counterclaim had been filed, "in order," as its preamble recites, "to simplify and expedite trial" and "for purposes of this Action only" (A. 55). The pertinent paragraph, together with the preamble setting forth the stipulation's purpose, is as follows:

> "*The parties to this Action, by their attorneys,* in fulfillment of certain understandings reached orally in the course of the pre-trial conference held herein on April 3, 1963, *in order to simplify and expedite trial* hereby stipulate and agree, *for purposes of this* Action only, as follows:
>
> • • •
>
> "4. *Plaintiff agrees* that for purposes of this litigation Plaintiff and its parent Hazeltine Corporation will be considered to be one and the same company" (A. 55).

The remaining paragraphs of the stipulation dealt with such things as the authenticity of certain documentary evi-

dence (para. 5), an agreement with respect to the use of copies of documents and patents (paras. 6 and 7), title to the patent in suit (para. 8), venue with respect to Zenith (para. 9), an agreement on the taxing of costs of the transcript (para. 10), and an agreement between the parties that neither would involve any other of plaintiff's patents in this or any other litigation until the instant litigation was concluded (paras. 1-3) (A. 55-57).

The stipulation was signed by counsel for Zenith and by "L. B. Dodds, Counsel for Plaintiff," *i.e.*, Hazeltine Research. The stipulation shows on its face these facts: (1) Hazeltine Corporation *was not a party* to the stipulation, (2) the stipulation *did not purport to bind Hazeltine Corporation*, and (3) the stipulation's purposes were procedural and limited to issues in a case *in which Hazeltine Corporation was not a party*. Although Mr. Dodds, who was Hazeltine Research's trial counsel, was also a vice-president of Hazeltine Corporation, he did not purport to execute the stipulation on behalf of Hazeltine Corporation and the record shows that he had relinquished all administrative responsibilities in Hazeltine Corporation's organization in 1960, several years before the stipulation was signed (A. 141-44, 772-73).[3]

3. Throughout its statement of facts and argument, Zenith attempts to attach some significance to the fact that Dodds still held the title of a vice-president of Hazeltine Corporation. In fact, by referring only to their capacities with Hazeltine Corporation, Zenith attempts to create the impression Dodds, Ruestow and Westermann were somehow acting at the trial for Hazeltine Corporation. However, Zenith fails to point out that Dodds testified that he was a director of Hazeltine Research *and* its attorney (A. 142), that Westermann was then president and a director of Hazeltine Research (A. 571), and that Ruestow testified that he was executive vice-president and a director of Hazeltine Research (A. 278); he was also a counsel of record for Hazeltine Research in the litigation (A. 110).

C. Circumstances Surrounding the Execution of the Stipulation Between Hazeltine Research and Zenith

The intent of counsel for both Hazeltine Research and Zenith with respect to paragraph 4 of the stipulation is also clear from the circumstances surrounding the entry of the stipulation.

The answer to the complaint raised (in its paragraph 13; A. 18-19) an unclean hands defense allegedly based on an antitrust violation involving foreign patents. The trial judge upheld a subpoena served upon Hazeltine Research which sought certain documents relating to Hazeltine Corporation's foreign patents (A. 3009). No immediate attempt was made to enforce this subpoena.

A pretrial conference was held on April 3, 1963, at which among other things, the matter of compliance with the subpoena was raised. At that time, counsel for Hazeltine Research, endeavoring to cooperate to facilitate pretrial discovery, indicated to the court that in order to simplify and expedite the trial *plaintiff*, Hazeltine Research, would not rely on the fact that it is a corporate entity separate and distinct from Hazeltine Corporation (A. 3009-10).

The disputed paragraph of the stipulation was in fact drafted by counsel for Zenith, and sent to counsel for Hazeltine Research by letter of April 26, 1963, as a part of a longer suggested form of stipulation. Counsel for Hazeltine Research made certain changes and additions to the stipulation, but did not change the paragraph in issue (A. 3009, 3010-15).

On March 26, 1963, Zenith had served, but did not file, a motion for leave to file its antitrust counterclaim against Hazeltine Research (A. 2996-99). Attached to that motion was a draft of Zenith's counterclaim (A. 3001-06), Count I

of which was identical to the counterclaim ultimately filed (A. 64-69). It did not name Hazeltine Corporation as a party and did not ask for relief against it (see pp. 5-7, *supra*). Since the stipulation did not exist on March 26, it is clear that in the drafting and serving of the proposed counterclaim Zenith *did not intend* to make Hazeltine Corporation a party or to seek recovery from it.

The stipulation was executed by counsel for Hazeltine Research on May 7, 1963. Counsel for Zenith executed the stipulation on May 15, 1963 (A. 3010). Thereafter, on May 22, 1963, Zenith filed its antitrust counterclaim against Hazeltine Research, not Hazeltine Corporation (A. 62). Indeed, as pointed out above, the counterclaim not only failed to name Hazeltine Corporation as a party but treated it throughout as a non-party.

At no time in the pretrial proceedings that followed the filing of the counterclaim, in the trial itself, or in the post-trial papers submitted before the proposed judgment, did counsel for Zenith indicate any intention to construe this stipulation as making Hazeltine Corporation a party. Nor did counsel for Hazeltine Research do or say anything that would indicate an understanding or intention that the stipulation made Hazeltine Corporation a party. And, as has already been pointed out, no attempt was ever made to name Hazeltine Corporation as a party to the action or to serve it with process.

D. The Judgments and the Special Appearance of Hazeltine Corporation

The trial judge adopted *verbatim and without opinion* the findings of fact and conclusions of law that had been proposed to him by Zenith on all issues including the issues of antitrust law violations and damages (A. 2857-58, 2892-2912). The findings did not suggest that the judgment would

run against Hazeltine Corporation. Nor did they state, as Zenith says in its brief (Z. Br. 42), that "Hazeltine Research, Inc., the nominal plaintiff, is so organized, controlled and its affairs so conducted that it is a mere agent, division and alter ego of the Hazeltine Corporation." On the contrary, the finding was only that the *parties* (*i.e.*, Zenith and Hazeltine Research) had stipulated that Hazeltine Research and its parent could be considered as one entity:

> "The parties stipulated that for the purposes of this litigation Hazeltine Research, Inc. and its parent, Hazeltine Corporation, would be considered as one entity operating as a patent holding and licensing company, engaged in the exploitation of patent rights in the electronics industry in the United States and in foreign countries" (A. 2893).

The amount of damages set forth in the findings totalled $16,238,872 (Finding XXXVI, A. 2908), which after trebling would have been in excess of $48.7 million. This was over fifteen times the net book value ($3,184,419) of Hazeltine Research, the only counterdefendant (A. 3007). It was upon entry of these findings that Zenith first took the position that Hazeltine Corporation should be treated as a party. In fact, Hazeltine Corporation first learned that Zenith proposed to hold it liable when, on the day following the entry of the findings, it was informed of a report by the Dow-Jones Company that Zenith's counsel had stated that the judgment to be entered would run against Hazeltine Corporation as well as Hazeltine Research (A. 3011).

Zenith's proposed form of judgment filed March 19, 1965 (A. 4), was the first paper filed in the District Court suggesting that the judgment should run against Hazeltine Corporation as well as Hazeltine Research. On Friday, April 2, 1965, Hazeltine Corporation filed a special appear-

ance pointing out that the entry of the judgment as proposed by Zenith against Hazeltine Corporation would deny it due process of law (A. 3008, 3019-30, 3042). However, the trial court on April 5, 1965, nevertheless entered a judgment against Hazeltine Corporation (as well as Hazeltine Research) in the amount of $19,042,173 (A. 3078-80).

In entering this judgment, the court made it clear that it was relying solely upon the stipulation. For when counsel indicated that Hazeltine Corporation desired to file a special appearance objecting to it being named as a party to the judgment, the trial court said:

> "Wasn't there a stipulation at the outset of this case that Hazeltine Research and Hazeltine Corporation were to be considered as one and the same?"[4]

The next day, at the hearing on the special appearance of Hazeltine Corporation, the trial court said: "You mean that pretrial stipulations are worthless?" (A. 3044).

When *Hansberry* v. *Lee*, 311 U.S. 32, 40-41 (1940), was cited to the trial court for the proposition that one cannot be bound by a judgment *in personam* in litigation to which he has not been designated as a party or been made a party by the service of process, the court asked: "Was there a stipulation in that case?" (A. 3047).

It is thus apparent from the questions asked by the trial court and set out above, that the entry of judgment against Hazeltine Corporation was based upon the stipulation and nothing else.

The trial judge entered the judgment against Hazeltine Corporation despite his acknowledgment that:

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4. This statement appeared at p. 2043 of the Printed Appendix in the Court of Appeals filed with the Clerk of this Court as a part of the record, but was inadvertently omitted from the Printed Appendix in this Court.

"Well, of course, Hazeltine Corporation wasn't a party to the lawsuit" (A. 3043).

There were further proceedings in the trial court after entry of the first judgment, but Hazeltine Corporation took no part in them. On December 9, 1965, it again appeared specially to oppose entry of the second judgment against it (A. 3536). But on December 13, 1965, the trial court entered judgment as proposed by Zenith and running against both Hazeltine Corporation and Hazeltine Research in the amount of $15,919,458 (A. 3539).

E. The Court of Appeals' Decision

After its appeal had been docketed, Hazeltine Corporation filed a motion under Rule 15(f) of the Rules of the Court of Appeals for the Seventh Circuit then in effect[5] to have the judgment of April 5, 1965, vacated for lack of jurisdiction of the trial court (A. 4131-37). After briefs were filed on behalf of Hazeltine Corporation and Zenith, the Court of Appeals ruled that the motion be decided at the same time as Hazeltine Research's appeal from this judgment (A. 4225). A similar motion was filed by Hazeltine Corporation in the appeal from the December 13, 1965 judgment (A. 4229-31), and the court ruled that this motion would also be "taken with the case" (A. 4232).

A total of five briefs were filed on this jurisdictional issue in the Court of Appeals and oral argument was heard by that court at the same time it heard arguments on Hazeltine Research's appeals from these same judgments. On December 13, 1967, the Court of Appeals entered its judgment that:

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5. Rule 15(f) of the Court of Appeals' rules then provided "that a substantial jurisdictional question may be raised by motion for determination before the hearing on the merits" (A. 4240 n. 2).

"(1) The judgments of the district court against Hazeltine Corporation *are vacated for want of jurisdiction over its person*" (A. 4236).

In its opinion of December 19, 1967 (A. 4238, 4240-44), the court relied on the undisputed facts that Hazeltine Corporation was not named as a party to the lawsuit in which the judgments against it were entered and that it was never served with process. It held that the principle announced by this Court in *Hansberry* v. *Lee*, 311 U.S. 32, 40-41 (1940), was "controlling" (A. 4242) and that the entry of the judgments against Hazeltine Corporation was a denial of due process of law. Accordingly, it held that:

"The judgments against . . . [Hazeltine] Corporation are void and must be vacated" (A. 4244).

SUMMARY OF ARGUMENT

Since Hazeltine Corporation was not a party to the complaint or named as a party in the counterclaim filed by Zenith against Hazeltine Research, and since it was never served with process, did not enter an appearance or participate in the trial, and was not brought into the suit in any manner, it was a violation of Hazeltine Corporation's constitutional right to due process of law under the Fifth Amendment to enter judgment against it.

Zenith's arguments that Hazeltine Research was the alter ego of Hazeltine Corporation and that Hazeltine Corporation controlled the litigation are irrelevant and erroneous. These issues were neither submitted to nor decided by the District Court. Moreover, even if Hazeltine Corporation had controlled the litigation, that fact would not have warranted making it a party to the judgments.

The sole basis relied upon by the trial court to support the entry of judgment against Hazeltine Corporation was

a pretrial stipulation entered into between Zenith and Hazeltine Research, but not Hazeltine Corporation. The stipulation shows on its face that Hazeltine Corporation was not a party to it and that it did not even purport to bind Hazeltine Corporation or make it a party to the case. Neither the circumstances which led to the stipulation nor anything which occurred after its execution indicated that anyone considered that it made Hazeltine Corporation a party to the litigation. Indeed, the fact that Hazeltine Corporation was not a party was conceded by the trial judge, and recognized by Zenith both in its pleadings and in its briefs in the trial court. Zenith first proposed that Hazeltine Corporation be treated as a party after the trial court had entered findings which called for a treble damage judgment over fifteen times the book value of Hazeltine Research.

ARGUMENT

I. THE COURT OF APPEALS FOLLOWED SETTLED CONSTITUTIONAL PRINCIPLES IN HOLDING THAT THE TRIAL COURT HAD NO POWER TO ENTER JUDGMENT AGAINST HAZELTINE CORPORATION, A NON-PARTY.

Zenith's brief fails to answer or in any way deal with the undisputed facts and the controlling basic constitutional principles relied upon by the Court of Appeals. These judgments were entered despite the facts, not disputed by Zenith, that (1) Hazeltine Corporation "wasn't a party to the lawsuit" (A. 3043), (2) Zenith made no attempt to designate Hazeltine Corporation as a party either in its counterclaim or in any other pleading which it filed before the first judgment was entered and (3) no attempt was ever made to serve Hazeltine Corporation with process.

Relying on these undisputed facts, the Court of Appeals held that the judgments must be vacated under the principle announced in *Hansberry* v. *Lee*, 311 U.S. 32, 40-41 (1940), where this Court held:

> "It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. . . . A judgment rendered in such circumstances is not entitled to the full faith and credit which the Constitution . . . prescribe[s] . . . and judicial action enforcing it against the person or property of the absent party is not that due process which the Fifth and Fourteenth Amendments require."

In *Hanson* v. *Denckla*, 357 U.S. 235, 249-50 (1958), this Court said that long before its landmark decision in *Pennoyer* v. *Neff*, 95 U.S. 714 (1878), it was recognized that "an exercise of jurisdiction over persons or property outside the forum State was thought to be an absolute nullity . . . [and] any judgment purporting to bind the person of a defendant over whom the court had not acquired *in personam* jurisdiction was void. . . ." The early common law principle that no court had the power to render a judgment or decree against one not served with process to appear and defend (*Hollingsworth* v. *Barbour*, 29 U.S. (4 Peters) 466 (1830); *D'Arcy* v. *Ketchum*, 52 U.S. (11 How.) 165, 174 (1850)) was held in *Pennoyer* v. *Neff*, 95 U.S. 714, 733 (1878), to be embraced in the constitutional guaranty of "due process of law." In 1957, this Court said:

> "It has *long* been *the constitutional rule* that a court cannot adjudicate a personal claim or obligation *unless* it has *jurisdiction over the person* of the defendant." *Vanderbilt* v. *Vanderbilt*, 354 U.S. 416, 418 (1957).

It is therefore clear that in vacating these judgments against Hazeltine Corporation, a non-party, the Court of Appeals was following settled constitutional principles established by this Court. The trial court's attempt to bind a non-party to a judgment *in personam* was a denial of procedural due process. *Riley* v. *New York Trust Co.*, 315 U.S. 343, 353 (1942). As this Court held in *Estin* v. *Estin*, 334 U.S. 541, 548-49 (1948), a court may not exercise *in personam* jurisdiction over a person not before the court.

Since Hazeltine Corporation was never a party to the action in which the judgments were entered, the judgments against it are void. The legal principles that were violated by the entry of these judgments are so fundamental that for the Court of Appeals to have permitted them to stand would have deprived Hazeltine Corporation of its property, if not its very corporate life,[6] without due process of law. The most basic procedural principles foreclose such a result.

Zenith dismisses this basis for the holding of the Court of Appeals with the assertion that there "obviously was no constitutional question as erroneously found by the Court of Appeals" (Z. Br. 123). It takes the erroneous position that Hazeltine Corporation, by appearing specially to oppose entry of judgment against it and expressly to safeguard its constitutional rights (A. 3019) thereby "submitted the factual issue of whether it was bound as a party under the circumstances of this case for determination by the Trial Court" (Z. Br. 123).

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6. The two judgments totaled $34,961,631 (A. 3078-80, 3539) and Hazeltine Corporation's net book value on December 31, 1964, was $21,068,763 (A. 3007).

The whole purpose of the special appearance by Hazeltine Corporation was to attack the jurisdiction of the trial court, not to submit the issue of its liability for determination by the trial court as a "factual issue." While the rules make it no longer *necessary* for one to file a special appearance to attack jurisdiction, *Orange Theatre Corp.* v. *Rayherstz Amusement Corp.*, 139 F.2d 871, 874 (3d Cir. 1944), *cert. denied*, 322 U.S. 740 (1944), the filing of a special appearance *serves to emphasize* the fact that the appearance *does not* constitute a submission to jurisdiction. *Bjorgo* v. *Weerden*, 342 F.2d 558, 560 (7th Cir. 1965).

Furthermore, as we shall show in the following sections of this brief, the trial court held no "hearing" on "factual" issues during Hazeltine Corporation's argument contesting the jurisdiction of the trial court. Instead, the trial court erroneously entered judgment against Hazeltine Corporation solely on the basis of the pretrial stipulation entered into between Hazeltine Research and Zenith, the only two parties to the litigation.

II. THE STIPULATION BETWEEN ZENITH AND HAZELTINE RESEARCH DID NOT MAKE HAZELTINE CORPORATION A PARTY TO THIS ACTION OR GIVE THE TRIAL COURT JURISDICTION TO ENTER A JUDGMENT AGAINST HAZELTINE CORPORATION.

The only rationalization for the trial court's entry of judgments against Hazeltine Corporation was the pretrial stipulation entered into by *Hazeltine Research* and Zenith (see p. 12, *supra*). The Court of Appeals held that "the stipulation was the principal if not the only basis for binding the Corporation in the judgments" (A. 4240) and that:

> "The stipulation relied upon by Zenith and the district court was signed only by the 'parties' to the counterclaim, *and the Corporation was not a party.* And there is no showing that the Corporation authorized HRI's [Hazeltine Research's] representative to sign on its behalf" (A. 4243).

As we shall show below, this holding is fully supported by the facts and nothing in Zenith's brief justifies a different result.

A. Hazeltine Corporation Is Not a Party to the Stipulation and By Its Clear Terms the Stipulation Was Not Intended to Bind Hazeltine Corporation to Anything.

The stipulation shows on its face that Hazeltine Corporation is not a party to it and that it did not even purport to bind Hazeltine Corporation in any way. It begins with this unequivocal statement, "The *parties to this Action*, by their attorneys . . . hereby stipulate and agree. . . ." (A. 55). As the trial judge noted, Hazeltine Corporation was *not* a party to this action (A. 3043). The disputed paragraph of the stipulation, paragraph 4, states that:

> "4. *Plaintiff agrees* that for purposes of this litigation Plaintiff and its parent Hazeltine Corporation will be considered to be one and the same company" (A. 55).

The agreement was that of "Plaintiff," which was Hazeltine Research and not Hazeltine Corporation. And a clear distinction is made between "Plaintiff," the party, and "its parent Hazeltine Corporation," the non-party. The stipulation was executed by counsel for Zenith and by "L. B. Dodds" who is specifically identified as "Counsel for *Plaintiff*" (A. 57).

As would be true in construing a contract, the plain meaning of the language used in the instrument should be

given effect.[7] And the plain meaning of the language here shows that the stipulation did not intend or even purport to bind Hazeltine Corporation in any way.

Moreover, since Hazeltine Corporation was not a party to the stipulation, it could not be bound by it even if the stipulation had purported to do so. "The general rule is well settled . . . that parties cannot by stipulation affect any rights but their own, and that persons not parties to the stipulation are not bound thereby." 83 C.J.S. *Stipulations* § 14 at 35; *accord,* 50 Am. Jur. *Stipulations* § 10; *Kneeland* v. *Luce,* 141 U.S. 437, 440-41 (1891); *Strand* v. *Garden Valley Tel. Co.,* 51 F.Supp. 898, 905 (D. Minn. 1943).

Zenith asserts that counsel for Hazeltine Corporation argued that the stipulation did not mean what it said (Z. Br. 48, 122). On the contrary, our position is and has been that the stipulation means exactly what it says, *i.e., Hazeltine Research* agreed that for purposes of the case it could be considered one and the same with its parent.[8] It is Zenith which has attempted to rewrite the stipulation, for it contends in effect that the stipulation should be construed to read "*Hazeltine Corporation* hereby enters its appearance and consents to jurisdiction and agrees that it is the same as its subsidiary" and that the signature should

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7. It is settled that the general principles of construction applicable to contracts are also applicable to stipulations. 83 C.J.S. *Stipulations* §11 at 26.

8. Zenith similarly misrepresents the Court of Appeals' decision when it says that the Court of Appeals held that the stipulation was "null and void" (Z. Br. 5, question 11). No one has ever attempted to have the stipulation held null and void. Hazeltine Research, the party to the suit and to the stipulation, has never attempted to repudiate the stipulation. Its defense of the counterclaim at the trial and its prosecution of the appeals on the merits have been fully consistent with the stipulation as written.

be construed to read "L. B. Dodds, Counsel for Plaintiff Hazeltine Research *and Hazeltine Corporation.*"

The stipulation was drafted by Zenith's counsel (see p. 9, *supra*). Surely, if the stipulation *were* intended to do what Zenith now contends, Zenith's experienced counsel would have selected language which would have done so. But instead, Zenith's counsel chose language which clearly limited the effect of the stipulation to the parties then named in the litigation *as parties* and carefully delineated Mr. Dodds' authority as that of counsel for plaintiff. Accordingly, it is impossible that counsel for Zenith was misled or persuaded to sign something different from the oral agreement which the written stipulation was to record. Indeed, if there could be said to be any doubt or ambiguity, it must be resolved against Zenith, the party which drafted the stipulation. See *Alcoa S.S. Co.* v. *United States,* 338 U.S. 421, 424-25 (1949); *Caterpillar Tractor Co.* v. *Collins Mach. Co.,* 286 F.2d 446, 450 (9th Cir. 1960); 17 Am. Jur. 2d, *Contracts* § 276.

Zenith now argues (Z. Br. 117-18), that Dodds, because he was an officer and director of Hazeltine Corporation, "had authority from . . . [Hazeltine Corporation] to execute the trial stipulation." This, of course, begs the question because Dodds did *not* execute the stipulation *for* Hazeltine Corporation. Certainly it cannot seriously be contended that the signing of the stipulation by Dodds, expressly as counsel for Hazeltine Research, thereby binds Hazeltine Corporation merely because Dodds also happened to hold the title of vice-president of that corporation[9] and had on

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9. Dodds testified that he no longer had any administrative responsibilities for Hazeltine Corporation (A. 772-73), and in an affidavit filed in support of the special appearance of Hazeltine Corporation he pointed out that he had no authority to bind Hazeltine Corporation (A. 3010).

other occasions represented it in litigation. Significantly, Zenith does not cite any authority for such a novel proposition, and we are aware of none.

Zenith apparently takes the position that despite the fact that Dodds signed the stipulation on behalf of Hazeltine Research, it was incumbent upon Hazeltine Corporation to offer proof that he was not signing on behalf of the corporation and had no authority to do so (Z. Br. 116-17). Significantly, it cites no reason or authority for this proposition which is directly contrary to the holding of the Court of Appeals that:

> "*Zenith had the burden* of establishing clearly that Dodds had authority to represent the [Hazeltine] Corporation in entering the stipulation prepared by Zenith. . . . We hold Zenith did *not* meet that burden" (A. 4243-44).

Zenith also says that no one from Hazeltine Corporation ever denied Dodds' authority and asserts that Ruestow and Westermann said nothing even though they were officers of Hazeltine Corporation[10] and were at the trial (Z. Br. 116). But Zenith ignores the fact that there was no reason or occasion for them to say anything because the stipulation did not purport to bind Hazeltine Corporation, and nothing was done during the entire trial which would indicate that Hazeltine Corporation had become a party or would be bound by the judgment. In fact, as Zenith knows full well, Hazeltine Corporation first learned that Zenith intended to ask that the judgment run against it when it was informed of the comments of Zenith's counsel by a Dow Jones wire service announcement *after the findings were entered* (A. 3011; see p. 11, *supra*).

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10. We have previously pointed out that Ruestow was at the trial as counsel of record for Hazeltine Research, and Westermann was president of Hazeltine Research (see n. 3, p. 8, *supra*).

Finally, Zenith would have this Court believe that there was some *sub rosa* understanding reached at the pretrial conference (though not of record) between the plaintiff, the defendant, and the judge that Hazeltine Corporation had become a party to the lawsuit.[11] This assertion flies squarely in the face of the clear language of the stipulation, which says that it was to set forth the understandings reached at the pretrial conference and yet reflects no understanding that Hazeltine Corporation submitted to jurisdiction or became a party.

The draft of the proposed counterclaim furnished by Zenith to Hazeltine Research in March 1963, before the April 3, 1963 pretrial conference and the May 7, 1963 stipulation, was against only Hazeltine Research and asked for a damage award against only Hazeltine Research (see pp. 9-10, *supra*). If it were true that an understanding had been reached *after* March 1963, that Hazeltine Corporation would submit to jurisdiction and become a party, then certainly before Zenith filed its motion for leave to file a counterclaim on May 22, 1963 (A. 62), it would have *revised* the March draft of the counterclaim to *name* Hazeltine Corporation *as a party* and to ask for relief against it. Certainly Zenith's experienced trial counsel would have taken this rudimentary step. Instead, it filed the very same counterclaim which was executed on March 21, 1963 (A. 69), and which specifically distinguished between Hazeltine Research, the party, and Hazeltine Corporation, the nonparty, and asked for damages only against Hazeltine Research (see pp. 5-7, *supra*). Failure to name Hazeltine

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11. For example, Zenith asserts that the trial court found against Hazeltine Corporation based on the court's "personal knowledge of what transpired at the April 3 Pretrial Conference" (Z. Br. 123). It also states that "all counsel" were present at that conference (Z. Br. 42) apparently trying to create the false impression that Hazeltine Corporation was represented.

Corporation as a party not only indicates a lack of intention to make it a party to the counterclaim but also renders any judgment against it void. As the court pointed out in *Smith* v. *Stone*, 202 F.Supp. 11, 12 (E.D. Ky. 1962):

> "Since . . . [the corporation] is not named in the caption of the complaint and has not been brought in by amendment, the court can consider no claim against it. . . ."

Accord, *United States* v. *Klein*, 230 F.Supp. 426, 440-41 (W.D. Pa. 1964), *aff'd per curiam*, 356 F.2d 983 (3d Cir. 1966): "There can be no judgment imposed upon non-record party defendants. . . ." See also, *Bland* v. *Britt*, 271 F.2d 193, 194 (4th Cir. 1959); *Lewis* v. *Continental Ins. Co.*, 239 F.Supp. 42, 44 (E.D.S.C. 1965).

It is obvious that the stipulation means just what it says: Hazeltine Research would stand accountable for Hazeltine Corporation. No one thought otherwise and the attempt to hold Hazeltine Corporation liable was an afterthought by Zenith when it found itself with a potential damage award of over fifteen times the net worth of Hazeltine Research (see p. 11, *supra*).

B. Neither the Circumstances Surrounding the Execution of the Stipulation Nor the Events Which Followed Indicate That Either Party Assumed or Intended That the Stipulation Made Hazeltine Corporation a Party to the Suit.

The circumstances which led to the execution of the stipulation are wholly inconsistent with any contention that Hazeltine Corporation was made a party to the suit by it. The purpose of the stipulation is clearly stated: "to simplify and expedite trial" (A. 55). The particular paragraph of the stipulation in dispute here is twice qualified and limited "for purposes of this Action only" (A. 55).

The procedural advantages to Zenith of the stipulation interpreted as written are obvious. It eliminated for Zenith the necessity of proving its allegation that Hazeltine Corporation and Hazeltine Research were co-conspirators and that Hazeltine Research, the party to the suit, was liable for acts at least in part allegedly performed by its parent, Hazeltine Corporation.

There were also procedural advantages to Hazeltine Research. Counsel for Hazeltine Research believed that the counterclaim was without merit and that it would save his client both trouble and expense and shorten the trial considerably if he agreed that his client, Hazeltine Research, for the purpose of this case, assumed liability for the acts of its parent, Hazeltine Corporation (A. 3009-11). But he did not and could not agree that Hazeltine Corporation would submit itself to jurisdiction or become liable on any judgment rendered against Hazeltine Research.

Thus, it is clear that the stipulation, interpreted consistently with the plain meaning of its language, did have a procedural advantage for the actual parties to the suit at the time it was agreed upon by them. On the other hand, Hazeltine Corporation had nothing to gain by this stipulation.[12] It could not be sued in the Northern District of Illinois under the antitrust laws (see p. 3, *supra*), and it could gain nothing by agreeing to submit itself to the jurisdiction of that court. Under such circumstances, a find-

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12. Zenith asserts that the stipulation was to Hazeltine Corporation's advantage because it expected favorable findings with respect to the antitrust issues (Z. Br. 126). Apparently Zenith would have this Court believe that because Zenith had served notice that it intended to file a counterclaim against Hazeltine Research, Hazeltine Corporation wanted to jump into the case to refute those charges Zenith intended to make.

ing that Hazeltine Corporation voluntarily submitted itself to jurisdiction and made itself a party to the suit by agreement, would require clear and unequivocal language in an agreement actually entered into by Hazeltine Corporation. But no such language is present here; indeed, it is clearly to the contrary.

The events following the execution of the stipulation similarly indicate that the parties assumed that Hazeltine Corporation was not a party. A week *after* the stipulation was executed, Zenith, with leave of court, filed a counterclaim that clearly and repeatedly recognized Hazeltine Corporation as an entity separate from the counterdefendant Hazeltine Research and as a non-party (see pp. 5-7, 23, *supra*). Tantamount to a clear admission that counsel for Zenith did not regard Hazeltine Corporation as a party after execution of the stipulation is the fact that Zenith included Hazeltine Corporation as a party in the caption of the case *for the first time* when on May 13, 1965, it filed in the District Court its appellee's statement required by Rule 12(d) of the former rules of the Court of Appeals (A. 4130). From the date of the execution of the stipulation on May 15, 1963, until after January 25, 1965, the date the trial court adopted Zenith's proposed findings of fact, neither Zenith's counsel nor the court below referred to or denominated Hazeltine Corporation as a party.

Zenith claims that at the trial its counsel was "fully relying on the stipulated fact that parent and subsidiary were one company in the litigation" (Z. Br. 119).[13] This

13. Zenith claims that this reliance is shown by its reading of the deposition of Dodds into the record as admissions against interest. The fact that Hazeltine Research did not object to this is completely consistent with the stipulation under which it agreed to stand liable for Hazeltine Corporation. Thus, the statements by an officer of Hazeltine Corporation could be used as admissions *against Hazeltine Research.*

claim of reliance does not hold up when examined in light of the record. For Zenith and its counsel not only distinguished between Hazeltine Research, the party, and Hazeltine Corporation, the non-party, in its counterclaim, they also made that distinction in paper after paper filed in this case after the execution of the stipulation. For example, in its pretrial brief, Zenith stated:

> "*Plaintiff is* a patent holding and licensing company, *wholly owned by* a large New York electronics manufacturing company called *Hazeltine Corporation*" (A. 3069; see also post-trial brief, A. 3071-72).

Indeed, the very finding upon which Zenith relies (Z. Br. 42) recognizes that Hazeltine Research, not Hazeltine Corporation, is the counterdefendant in this case:

> "IH. *Counterdefendant, Hazeltine Research, Inc.*, the party plaintiff in this suit, is an Illinois corporation owned and operated as a wholly owned subsidiary of Hazeltine Corporation, a New York corporation, engaged in the manufacture and sale of electronic equipment and devices. . . ." (A. 2893).

Zenith drafted this finding, adopted by the trial court. It characterized Hazeltine Corporation only as the parent, *not* as an additional "counterdefendant."

Furthermore, Zenith repeatedly recognized that Dodds was acting as attorney for Hazeltine Research in this case and not as attorney for Hazeltine Corporation. For example, in its pretrial brief on the antitrust issues, Zenith referred to Dodds as: "Mr. Dodds, *plaintiff's attorney* and a director and officer of Hazeltine Corporation" (A. 3070). The identical description appears in Zenith's post-trial brief (A. 3072).

In *United States* v. *Klein*, 230 F.Supp. 426, 440-41 (W.D.Pa. 1964), *aff'd per curiam*, 356 F.2d 983 (3d Cir.

1966), the court refused to enter a judgment against a partnership and individual partners not named in the complaint, holding that it would be improper to do so since (as is the case here) the complaint showed no intention to place liability on the absent parties:

> "The plaintiff's argument, both orally and in its brief, is unusual and in any event rather late to attach liability when it has failed to take action in its pleadings and throughout the trial of the case *to show any intention* to hold the partnership and its individual members. Since [neither] the partnership nor its individual members are here on record as party defendants, there can be no judgment against the partnership or the individual members as such" (230 F.Supp. at 440).

There is nothing in the record, briefs or findings below to indicate that anyone considered Hazeltine Corporation a party to the lawsuit. Certainly any lawyer who intended to try to obtain a judgment of this magnitude against a company not named as a party and not served with process, would at some point during the proceedings, file some motion to attempt to correct that fatal defect in jurisdiction. Yet, it was not until *after* Zenith had obtained entry of its proposed findings calling for a judgment many times the net worth of Hazeltine Research, that it indicated it would claim a judgment against Hazeltine Corporation.

III. ZENITH'S ALTER EGO ARGUMENT IS IRRELEVANT AND ERRONEOUS.

In an attempt to lift itself by its own boot straps, Zenith argues that somehow, at some undisclosed time, the trial court determined that Hazeltine Research was the alter ego of Hazeltine Corporation. On the assumption that such a finding was made, Zenith devotes considerable space in its

brief to an argument that there is evidence which would support such a finding (Z. Br. 42-47, 121-23). However, this argument is irrelevant and erroneous because the question of whether Hazeltine Research was the alter ego of Hazeltine Corporation was never submitted to the trial court, never decided by it, and is not the subject of any finding.

A. The Judgments Entered Against Hazeltine Corporation Were Not Based Upon the Alter Ego Doctrine.

The *only* trial court finding in any way relating to this issue is Finding III (A. 2893) which expressly states that it is based upon what *"the parties* stipulated" (see p. 11, *supra*). Zenith asserts (Z. Br. 42) that the findings of fact adopted by the trial court "clearly *recognized*" that "Hazeltine Research, Inc. the *nominal plaintiff*, is so organized, controlled and its affairs so conducted that it is a mere agent, division *and alter ego* of the Hazeltine Corporation." The *record* references claimed to support the statement contain not one word concerning alter ego or the facts required to bring that doctrine into play.[14] For example, the findings cited by Zenith make no mention of highly relevant factors such as the capitalization of the subsidiary, the separateness and independence of its operations, whether its business was in fact run by its own Board of

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14. Zenith refers to A. 2857, the letter of the trial judge adopting Zenith's findings; to A. 2859, which is Finding 1 that Hazeltine Research is a patent holding and licensing company with a place of business in Chicago, Illinois; to A. 2893, which is Finding III referred to above, and to A. 2913, 2914, which are findings proposed by Hazeltine Research but not adopted, and which similarly refer only to the stipulation and make no reference to "alter ego." Furthermore, since these proposed findings of Hazeltine Research were rejected by the trial court they contain no support for any contention that the *trial court found* that Hazeltine Research was the alter ego of Hazeltine Corporation.

Directors. See, *e.g.*, Powell, Parent and Subsidiary Corporations, § 6, p. 8 (1931).

There can be no doubt that the trial court's entry of judgment against Hazeltine Corporation was based solely upon the trial judge's erroneous interpretation of the effect of the stipulation, and *not* on any consideration of evidence or supposed finding of *alter ego*. That fact was made abundantly clear during the colloquy relating to Hazeltine Corporation's special appearance (see p. 12, *supra*). During the argument on the special appearance, the court never once referred to the *alter ego* doctrine or to any supposed evidence on that question. Instead, his remarks and inquiries to counsel related to the stipulation (see p. 12, *supra*).

Accordingly, after referring to Finding III (A. 2893) which was based on the stipulation, the Court of Appeals concluded:

> "The court made no other findings relating to 'piercing the corporate veil,' and our reading of the colloquys between counsel and the court leads us to the conclusion that the stipulation was the principal if not the only basis for binding the Corporation in the judgments" (A. 4240).

The plain fact is that the question of whether Hazeltine Research was in fact the alter ego of Hazeltine Corporation was never in issue or tried in the trial court or ruled on in the Court of Appeals. Hazeltine Corporation was never heard on the issue and neither court below made any determination of this alleged issue. As the Court of Appeals held:

> "The resolution of the alter ego issue can be made only after an adversary determination of the facts involved. This court cannot make an initial determination of these facts, and *the district court did not do so*" (A. 4242).

Thus Zenith's claim that its alter ego theory is supported by certain "documentary evidence" (Z. Br. 44) and by findings of fact proposed by Hazeltine Research but not adopted (Z. Br. 121) would have no legal significance even if true. In effect, Zenith is requesting that this Court make original findings of fact on an irrelevant issue not passed on by either court below. Moreover, the "documentary evidence" and Hazeltine Research's proposed findings would not warrant an original finding of "alter ego" by this Court. They are totally silent on such important facts as the adequacy of Hazeltine Research's capital and whether Hazeltine Research has business and assets acquired on its own. See Powell, Parent and Subsidiary Corporations, § 6 at 9 (1931).[15]

We submit that Zenith's "alter ego" theory has no basis and is designed to obscure the constitutional grounds on which the Court of Appeals vacated the judgments against Hazeltine Corporation.

B. The Cases Cited By Zenith Are Inapposite.

The authorities which Zenith relies upon to support its *alter ego* theory (Z. Br. 123-26) are totally inapposite. Not one of the cited cases involved the question of whether the corporate veil should be pierced to make a company a party to the lawsuit in which it was not named or served with process. Instead, they all involve the question of whether a company ***which was a party,*** which had been named and had either filed the suit itself or had been served

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15. While Hazeltine Research is a small corporation of modest resources compared to Zenith, it is nevertheless adequately capitalized. It put up not only its valuable U.S. patents, but also $2,600,000 of its own government securities as a part of the supersedeas bond agreement in this case.

with process, should be held liable for the acts of some other company. That is not the case here.

For example, in *Chicago M. & St. P. Ry.* v. *Minn. Civic Ass'n*, 247 U.S. 490 (1918), on which Zenith seems to place primary reliance, *both* the wholly owned corporation and its two stockholders were *named* parties to the litigation from the very beginning when a petition was filed *against all three of them* in a proceeding commenced before a state railway commission.

Similarly, in *Allied Chem. Corp.* v. *Randall*, 321 F.2d 320 (7th Cir. 1963) and *Sisco-Hamilton Co.* v. *Lennon*, 240 F.2d 68 (7th Cir. 1957), quoted from by Zenith (Z. Br. 124-25), as well as in the other cases cited by Zenith (Z. Br. 126), the party against whom the doctrine was applied was a named party and before the court. In addition, in *Shamrock Oil & Gas Co.* v. *Ethridge*, 159 F.Supp. 693 (D. Colo. 1958), cited by Zenith (Z. Br. 126), the corporation sought to be bound was not only named as a party and present in court to be heard on the issue, but the court, in applying the *alter ego* doctrine, was careful to point out:

> "It should be noted, however, that this is done only for the purpose of adjudging the rights and liabilities of *the parties in the case*" (159 F.Supp. at 697).

IV. ZENITH'S ARGUMENT THAT HAZELTINE CORPORATION SHOULD BE HELD LIABLE BECAUSE IT IS CLAIMED TO HAVE CONTROLLED THE DEFENSE HAS NO BASIS IN LAW OR FACT.

Zenith asserts that Hazeltine Corporation was "obviously in court defending" the counterclaim against Hazeltine Research (Z. Br. 43). This contention has no basis in the record and even if true would afford no basis for the entry of judgment against Hazeltine Corporation.

This Court long ago established the principle that a court has no power to enter a judgment *in personam* against a non-party who has not been properly served with process *even though* it is unquestioned that the non-party "conducted, controlled, and directed the defense of the suit." *Merriam Co. v. Saalfield*, 241 U.S. 22, 24 (1916). In the *Merriam* case, reaffirmed nearly half a century later in *Schnell v. Peter Eckrich & Sons, Inc.*, 365 U.S. 260, 263 (1961), this Court made it clear that this rule had been universally applied:

> "No case to which we are referred, nor any other that we have found, goes to the extent of sustaining ... a decree *in personam* against a party upon the ground that he had participated in the defense . . . so as to become bound upon the doctrine of *res judicata*" (241 U.S. at 31).

Relying on the *Merriam* case, the court below held that:

> "We think *Merriam* v. *Saalfield*, 241 U.S. 22 (1916), refutes Zenith's contention that control of the litigation by Hazeltine Corporation made it amenable to joinder after findings of fact and conclusions of law were adopted without service of process. In *Merriam* it was clear that Ogilvie had controlled the defense for Saalfield, the defendant named in the original suit. Here the facts are only that Dodds, attorney for plaintiff HRI [Hazeltine Research], was an officer and a counsel for the Corporation. There is no showing that he was authorized to act for the Corporation. *We find no basis for joining the Corporation because of its claimed participation in the trial*" (A. 4243).

Zenith has cited no authority contrary to these settled principles and we are not aware of any.

Furthermore, there is no factual basis for Zenith's contention that Hazeltine Corporation was "in court defend-

ing" the counterclaim against Hazeltine Research.[16] This claimed issue was never tried and the trial court *made no finding* on it. Zenith places reliance on a statement made by Hazeltine Research's trial counsel during a colloquy with the trial court where he used the pronoun "we" in referring apparently to the activities of Hazeltine Corporation (*e.g.*, Z. Br. 43, 119). Leaving aside the obvious fact that such a statement wholly fails to prove Hazeltine Corporation was defending the counterclaim, the statement by Hazeltine Research's trial counsel was completely consistent with the stipulation under which Hazeltine Research agreed to stand liable for the alleged acts of Hazeltine Corporation.[17]

Zenith also seeks to attach some significance to the findings proposed by Hazeltine Research and rejected by the trial court (Z. Br. 47-48, 121-22), saying that these proposed findings were "in favor of the Hazeltine Corporation" (Z. Br. 121). However, since the effect of the stipulation was that Hazeltine Research assumed responsibility for the acts of its parent, Hazeltine Corporation, and since under the counterclaim Hazeltine Research was alleged to

16. Zenith also appears to find some significance in the fact that Dodds, Westermann, and Ruestow, officers of Hazeltine Corporation, were present at the trial (Z. Br. 116). This fact, of course, does not make Hazeltine Corporation a party to the lawsuit. Thaxton v. Vaughan, 321 F.2d 474, 479 (4th Cir. 1963). Moreover, all three were present in capacities for Hazeltine Research (see n. 8, p. 8, *supra*).

17. Similarly, the McFarland letter (DX 36, A. 1141-45) (Z. Br. 43-44) fails to prove that Hazeltine Corporation was defending the counterclaim. The letter itself makes no mention of the counterclaim but refers to the enforcement of Hazeltine Research's color patents. This letter and the other letters referred to by Zenith (Z. Br. 43-45) are apparently relied upon primarily to support Zenith's *alter ego* theory which is discussed in detail at pp. 28-32, *supra*.

be a co-conspirator with Hazeltine Corporation, it was perfectly natural for Hazeltine Research to seek findings that the patent pools and its parent's relation thereto did not constitute violations of the antitrust laws. The fact that *Hazeltine Research* sought such findings certainly did not mean that Hazeltine Corporation was controlling the litigation or had submitted itself to jurisdiction and become a party.

CONCLUSION

For all the reasons set forth above, the action of the Court of Appeals vacating the judgments as to Hazeltine Corporation should be affirmed.

Respectfully submitted,

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